Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1082

ALVAH H. WEATHERS, PETITIONER,

VS.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PHILIP DONALD DEHOFF,
Jacksonville, Florida,
Attorney for Petitioner.

INDEX

CITATIONS

CASES

STATUTES

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

ALVAH H. WEATHERS, PETITIONER,
VS.
UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Supreme Court of the United States:

Now comes Alvah H. Weathers and respectfully shows to this Honorable Court as follows:

1.

Petitioner prays that writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled case, No. 9912, entered on February 28, 1942 (not yet reported), affirming the orders and judgment of the District Court for the Southern District of Florida, Jacksonville Division. (R 237-242)

JURISDICTION.

The Jurisdiction of this Court is invoked under Section 240-(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Rules of Practice and Procedure in Criminal cases promulgated by this Court.

QUESTIONS PRESENTED.

1. Where the indictment letters alleged to have been written by petitioner did not state positively how, where or by whom an abortion would be produced, was not the court in error in not quashing the indictment?

2. Where, on the first trial of the petitioner on an indictment containing two counts, a Motion for Directed Verdict was granted as to the second count thereof and the jury subsequently found the petitioner not guilty on the second count and after judgment the said case is appealed and a new trial granted, and thereafter on subsequent trial on the first count was not the lower court in error (a) in admitting into evidence certain letters upon which original second count of indictment was based, including the letter actually charged therein, and which were specifically charged in said second count and in said first trial had been introduced into evidence, and (b) especially when sufficient proof was not offered even in the second trial of the cause to show that defendant had written said letters?

3. When, during the course of a trial for violating the postal laws where all letters allegedly written by defendant were secured in answer to decoy letters, the Government's witness stated that "he had received a complaint that the defendant was committing abortions," (a) was not the Court in error in admitting said statement, and (b) if court was not in error in admitting such statement, did not the Court err in denying the petitioner the

right to inquire into the nature of the complaint in an attempt to establish the defense of entrapment without reasonable grounds on the part of the decoying officials to believe that the accused had previously committed a crime of the same character as the one in which he was sought to be decoyed?

4. Where the petitioner is charged with sending information through the mails as to where, how, and by whom an abortion could be produced, was not the court in error in allowing one of the witnesses to testify as to alleged statement petitioner was supposed to have made that he performed abortions?

5. Did not the trial court err in not rebuking and repressing the conduct of the Assistant District Attorney, (a) during the course of the trial by allowing him to make innuendoes and suggestions of criminality on the part of the accused and unauthorized attacks on the character and professional standing of accused under guise of cross-examination; (b) for his remarks and statements in his argument to the jury on matters dehors the record and intended to incite the passions and influence the minds of the jury?

6. Did not the Court (a) err in giving additional charge to the Jury without first advising counsel for both parties of his intentions to do so, and accord to them a reasonable opportunity to request special charges; (b) coerce the minds of the jurors both by depriving them of their right to pass on all questions of fact, and (c) charging them so that failure to agree would be a reflection upon the intelligence and integrity of some of them; (d) in effect gag defense counsel and attempt to shut off proper objections to argument?

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioner was charged with violating Tit. 18, Sec. 334, U. S. C. A., by sending through the mails information as to how, where and from whom abortions could be produced. The original indictment consisted of two counts, charging two separate offenses. On the first trial, the court entered its Directed Verdict of "Not Guilty" on the second count for the defendant (Record, First Appeal, Circuit Case No. 9541, page 134) and therafter the jury returned a verdict finding the defendant "Guilty" on the first count and "Not Guilty" on the second count (Record, First Appeal, Circuit Case No. 9541, page 171).

An appeal was taken from that verdict which resulted in a new trial being granted on the ground of improper argument by the United States Attorney (*Weathers* v. *U. S.*, 117 F. 2d 585). Prior to presenting evidence on the new trial the petitioner renewed his plea for a Motion to Quash the first count, which was denied (R. 24, 25). Ground on said Motion to Quash being the same as on original case (Record, First Appeal, Circuit Case No. 9541, pages 8-12). Said motion had been previously passed upon by the Circuit Court of Appeals adversely to the petitioner although the Circuit Court stated in effect that said indictment was poorly drawn (*Weathers* v. *U. S.*, 117 F. 2d 585). Thereafter on this new trial, testimony showed that one E. O. Jones, a Post Office Inspector, stated he had received a complaint that the defendant was sending through the mails information regarding abortions (R. 81 and 86). On the first trial Jones stated on cross-examination that prior to writing the decoy letters he had never had any prior information that petitioner had ever used the mails to solicit any abortions, but on cross-examination in the instant case he stated he had. He was then impeached by reading to him his prior testimony (R. 81-87). That he thereafter, in conjunction with Post Office Inspectors in Savannah, prepared decoy letters which he

forwarded to Savannah for mailing to the defendant's address in Jacksonville (R. 47).

The defendant had, for many years previous, inserted in newspapers in various southern cities advertisements regarding a "maternity home" (R. 177).

After introduction by the government of the decoy letter and defendant's reply thereto—which defendant subsequently admitted sending—(R. 175) the government then proceeded to introduce all the other letters that had been used on the first trial, one of which letters constituted the basis of the second count of the original indictment (See certified copies of Transcript on the First Appeal, Case No. 9541, Circuit Court of Appeals, pages 5, 70, 79-82, filed herein for said purpose).

These were allowed to be filed for identification and later introduced in evidence, despite defendant's objections that they were *"res judicata"* and the Court had granted a Directed Verdict with respect thereto on the first trial of said cause, stating in effect that there had been insufficient evidence to connect defendant with the said letters (R. 52-60).

During the course of the trial the Government introduced a certain witness who testified that petitioner had told her that he got a certain sum for each abortion (R. 102).

When petitioner testified, the Court over objection permitted the Assistant District Attorney not only to question him on his previous conviction of a crime which he had admitted on direct examination (R. 175, ~~173~~) but to go into the number of times (R. 185-187). The Court further allowed the Government to inquire of defendant whether he had been disbarred from the practice of medicine (R. 188-191) although the defendant had not offered any character evidence and although it was known to the District Attorney that defendant's right to reinstatement had been upheld by the Supreme Court of Florida. *State ex rel. Weathers* v. *Davis et als.*, 143 Fla. 250, 196 So. 487, decided May 28, 1940.

That during the course of the District Attorney's argument to the Jury he made numerous prejudicial statements and further argued facts that were nowhere introduced into evidence, and upon attempt of petitioner's counsel to object to said argument, the Court in effect gagged and closed the mouths of counsel (R. 206 and 208).

One of the main defenses of the petitioner was entrapment, but the Court refused to permit the petitioner to inquire into the nature of the information allegedly given to the Post Office Inspector upon the basis of which the decoy letters were written (R. 87). After the Jury had returned a number of times for further instructions on the law of entrapment, the Court went on to charge the Jury, in part:

> "The main question in this case, gentlemen, is the question of intent. * * * The whole thing is intent on the part of the defendant. * * * Now, that is all there is to this case. * * *" (R. 226, 227).

The Court further attempted to give an additional charge thereafter on the lines of the "Allen Case" (R. 223), but which transcended the statements of said case.

To some of the Court's rulings it will be noticed that no exception was asked but the court had previously stated that:

> "Note exceptions to every adverse ruling, but I don't think it is necessary" (R. 107).

Moreover, it has been held that

> "The courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical errors in the trial which appear to have been seriously prejudicial to the rights of the defendant, although the questions they present were not properly raised or preserved by objection, exception, request, or assignment of error."
> *McNutt* v. *U. S.*, (C. C. A. 8) 267 Fed. 670.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in approving the action of the trial court:

1. In not quashing the indictment.

2. In admitting in evidence over defendant's objection (a) the letter charged in the second count of the indictment which the defendant had been found not guilty of writing by directed verdict of the Court on the first trial of the case; and (b) certain other letters introduced in the first trial to support the said second count of the indictment.

3. In permitting the prosecuting witness who instigated the sending of the decoy letters to testify that he had received a complaint that the defendant was committing abortions.

4. In denying defendant the right to enquire, for the purpose of showing entrapment, into the nature and extent of the information upon which the Post Office Inspector based his sending of decoy letters.

5. (a) In not granting a directed verdict upon the basis of entrapment when there was no showing that the decoying officials had legally sufficient knowledge and information to believe that the accused had previously committed a crime of the same character as the one in which he was sought to be decoyed,

(b) In not granting a directed verdict upon the basis of entrapment when it was shown that the only information upon which the decoying officials of the United States predicated their sending of decoy letters was that the accused was violating a State and not a Federal statute.

6. In allowing a government witness to testify concerning a statement alleged to have been made to her by accused to the effect that he performed abortions, when the accused was on trial not for committing abortions, a State offense, but for the Federal offense of sending prohibited matter through the mails.

7. In permitting the Assistant District Attorney:

(a) To make innuendoes and suggestions of criminality on the part of the accused under the guise of cross-examination;

(b) To make unauthorized attacks on the character and professional standing of the accused under the guise of cross-examination;

(c) To argue to the Jury on matters dehors the record in a manner intended to incite the passions and influence the minds of the Jury.

8. In giving additional charges to the Jury without first advising counsel of his intention so to do, and accord counsel a reasonable opportunity to request special charges.

9. In effect coercing the minds of the Jury by depriving them of their right to pass on all questions of fact by telling them after they had returned a number of times for additional instructions on the law of entrapment: "The whole thing is intent on the part of the defendant. * * * Now that is all there is to this case. * * *"

10. In charging the Jury so that failure to agree would seem to be a reflection upon the intelligence and integrity of some of them.

11. In effect gagging defense counsel and attempting to shut off proper objection to argument.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner prays this Honorable Court for writ of certiorari directed to the Fifth Circuit Court of Appeals of the United States, and submits that this is a proper case for the granting of said writ for the following reasons, among others:

Because the United States Circuit Court of Appeals, Fifth Circuit, in affirming the judgment and order of the District Court:

(a) Has decided important questions of law in a way in conflict with applicable decisions of this Supreme Court.

(b) Has decided important questions of law in ways which conflict with applicable local decisions.

(c) Has decided important questions of general law and its decision is in conflict with the great weight of authority, and with the decisions of the other Circuit Courts of Appeal and of this Supreme Court.

(d) Has so far departed from the accepted and usual course of judicial procedure and has so far sanctioned such a departure by a lower court as to call for an exercise of the power of supervision by the United States Supreme Court.

(e) Has rendered null and void the safeguards of the Sixth Amendment to the Constitution of the United States, which provides that

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with witnesses against him, * * * and to have the assistance of counsel for his defense."

In view of the foregoing reasons and the supporting brief hereafter attached, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP DONALD DEHOFF,

Attorney for Petitioner.

ARGUMENT IN SUPPORT OF PETITION.

1.

On Motion to Quash.

On the First Appeal from conviction, the Circuit Court of Appeals for the Fifth Circuit ruled that the lower court did not err in denying petitioner's motion to quash (*Weathers* v. *U. S.*, 117 F. 2d 585); however, in order to protect defendant's rights, counsel for the petitioner again renewed his motion to quash which raised the same grounds (R. 24-25). These grounds were set forth in full in the Transcript of the First Appeal Circuit Case No. 9541, pages 8-12).

It is our contention as the Court will see from a perusal of the indictment letter which the petitioner wrote that there is no *positive* assertion that the petitioner *would* give information how, where or by whom an abortion might be produced. A positive assertion is necessary to sustain an indictment and this was held necessary in the case of *Bours* v. *U. S.*, (C. C. A. 7) 229 Fed. 960.

2.

On Res Judicata As to Matters Raised by Original Second Count of Indictment.

On the first trial, when the court, after hearing all the evidence presented by the government, granted the defendant's Motion for directed verdict as to the second count and the Jury's verdict thereafter of not guilty was brought in, this judgment ascertained that the facts which were the basis for that second count did not exist. This was ascertained once and for all that as between the United States and the petitioner the same facts could not be again litigated or tried by them. *Coffey* v. *U. S.*, 116 U. S. 436, 6 S. Ct. 436, 29 L. Ed. 684; *U. S.* v. *Moser*,

266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262; *In re Food Conservation Act*, 254 Fed. 893; *U. S.* v. *Carlisi*, 32 Fed. Supp. 479.

3.

On Matters Pertaining to Hearsay, Violation of State Law and Entrapment.

When the Court allowed the prosecution's witness, Post Office Inspector Jones, to testify that he had received complaints that the petitioner was committing abortions, the Court permitted inadmissible and fatally prejudicial testimony to be admitted into evidence. This statement was bald hearsay, or hearsay of hearsay. *Mattson* v. *U. S.*, (C. C. A. 8) 7 F. 2d 427; *Bolt* v. *U. S.*, (C. C. A. D. C.) 2 F. 2d 922; *Yep* v. *U. S.*, (C. C. A. 10) 83 F. 2d 41; *Gambino* v. *U. S.*, (C. C. A. 3) 108 F. 2d 140; *Biandi* v. *U. S.*, (C. C. A. 6) 259 Fed. 93.

The fact that the hearsay statement is under oath is not sufficient to remove the objection for there continues to be a deprivation of the defendant's Constitutional right to confront his accusers and subject them to cross-examination. *Gambino* v. *U. S.*, (C. C. A. 3) 108 F. 2d 140.

Assuming that the Court was not in error in allowing this hearsay testimony, the bare complaint is so indefinite that it gave the defendant no chance or opportunity to refute it and specified no persons who made any of the complaints to which Post Office Inspector testified. It specified no time when, place where, or circumstances surrounding, any such complaint and it was not competent evidence of the charge contained in the indictment. The court, we contend, was in error in not allowing the Petitioner to inquire into these above facts. The Post Office Inspector stated that after receiving these complaints he thereupon proceeded to send the decoy letters. The essence of the justification in decoy is that the decoying officer must have personal knowledge or perception of commission by the accused of similar of-

fenses to that which he is seeking to decoy. *U. S.* v. *Schultz*, 3 Fed. Supp. 273; *U. S.* v. *Tom Yu*, 1 Fed. Supp. 357. A necessary prerequisite for sending decoy letters is that the Petitioner had been previously engaged in the described conduct or conduct of same kind so as to justify entrapment letters. *U. S.* v. *Becker*, (C. C. A. 2) 62 F. 2d 1007; *U. S.* v. *Adams*, 59 Fed. 674; *Hunter* v. *U. S.*, (C. C. A. 5) 62 F. 2d 217. *Sorrells* v. *U. S.*, 287 U. S. 434, 53 S. Ct. 210, 77 L. Ed. 413.

Denied the right to inquire into the nature of the Government's information the petitioner was in effect denied the right to show that he was, in fact, entrapped. The right to inquire into the basis for entrapment is set forth in *Sorrells* v. *U. S.*, 287 U. S. 434, 53 S. Ct. 210, 77 L. Ed. 413.

4.

On Additional Hearsay and Violation of State Law.

The court, in an attempt to prove the Government's charge for illegally using the mails, permitted the District Attorney to question a witness as to an alleged conversation with the petitioner in which he is reported to have stated that he got Fifty dollars for every abortion. The inescapable conclusion is that it was an attempt to prejudice the petitioner in the eyes of the Jury; it attempted to prove commission, not of a Federal offense but of a State offense. Sending through the mails of the illegal matter was utterly ignored and the trial resulted in the conviction of the accused, not for an offense condemned by Federal statute but offense covered by state statute contrary to the settled rule. *Krause* v. *U. S.*, (C. C. A. 4) 29 F. 2d 248.

The petitioner stated that he did get Fifty dollars from every patient, but this amount covered the cost of child delivery, room and board (R. 182).

Testimony of a witness as to statement by defendant having no connection with the offense charged was in-

competent and its admission prejudicial error, especially where the defendant was a witness and his testimony conflicted with that of another witness is settled. *Toothman* v. *U. S.*, (C. C. A. 4) 203 Fed. 218; *Safter* v. *U. S.*, (C. C. A. 8) 87 Fed. 329.

5.

Conduct of Assistant District Attorney.

On direct examination, the petitioner herein answered that he had been previously convicted of a crime (R. 179). On cross-examination the lower court permitted the District Attorney to inquire into the number of times he had been convicted (R. 185-187). In the case of *Cross* v. *State*, 96 Fla. 768, 119 So. 380, the Florida Supreme Court said:

> "This court has held in numerous cases that, where an accused while on trial voluntarily offers himself as a witness on his own behalf, he thereby voluntarily subjects himself to any legitimate cross examination, whether such cross examination tends to incriminate him or not, and the state has the right on cross examination to interrogate him as to whether he has been previously convicted of a criminal offense. * * * Of course, there are limits beyond which this character of cross examination cannot be pursued. For instance, where the accused admits the fact of a former conviction, this character of cross examination cannot be further pressed upon the accused merely for the purpose of showing that the accused, having been convicted of other crimes of like character, would be likely to commit the crime with which he is charged."

The court permitted examination by the government as to whether the petitioner had been disbarred from practice of medicine and further questioned the petitioner as to whether his ex-wife was his commonlaw wife (R. 188-191). The sole purpose of this line of cross examination was an attack on petitioner's character or reputation, to more readily induce belief that the petitioner

was guilty of the charge for which he was being tried, *Messer et al.* v. *State*, 120 Fla. 95, 162 So. 146.

> "The character of a person accused of crime is not a fact in issue, and the state cannot, for the purpose of inducing belief in his guilt, introduce evidence tending to show his bad character or reputation, unless the accused, conceiving that his case will be strengthened by proof of good character opens the door to proof by the prosecution that his character in fact is bad. This salutary rule is not permitted to be violated by the state, even when the defendant offers himself as a witness. * * * And this is true, although a defendant offering himself as a witness is subject to impeachment just like any other witness so far as his status and character as a witness, not as a defendant on trial, is concerned."
>
> *Jordan* v. *State*, 107 Fla. 333, 144 So. 669.

It was well known or should have been known to the prosecuting attorney that the petitioner's right to reinstatement of his license to practice medicine had been upheld by the Supreme Court of Florida, in *State ex rel. Weathers* v. *Davis*, 196 So. 487, 143 Fla. 250, decided May 28, 1940.

In the case of *Butler* v. *State*, 94 Fla. 163, 113 So. 699, the Court said:

> "Want of chastity on the part of a witness cannot be inquired into in any case for the *sole* purpose of affecting his or her credibility as a witness."

During the course of the argument objections were made to numerous remarks by the government's attorney not based on evidence such as his use of the word "dope peddlers" (R. 201-202) and to his further characterization of defendant's place as a "dive" (R. 208-209). During the further course of the argument the prosecuting attorney went beyond the scope of any evidence introduced therein (R. 204-206, 211 and 213), and suggested that the Government had certain information or evidence

which it could have used in place of the decoy letters. These statements of counsel in argument were not inadvertent and were not made in the heat of argument with opposing counsel, but were deliberate. They were intended by counsel to influence the jury improperly and in all probability did so influence the Jury (R. 211). *Turner* v. *U. S.*, (C. C. A. 8) 35 F. 2d 25; *Latham* v. *U. S.*, (C. C. A. 5) 226 Fed. 420. The innuendoes and suggestions of general criminality were calculated to arouse a spirit of resentment and tended to incite the passions and influence the minds of the jurors against defendant and went far beyond reasonable bounds of argument. *Clinton* v. *State*, 53 Fla. 98, 43 So. 312.

It is necessary in order to obtain a clear picture of the course of conduct of the Assistant District Attorney to read the entire testimony, but we think that from a perusal of the few excerpts cited herein, this Honorable Court will immediately grasp the situation. We think that this case is analogous in every respect to the principle which was condemned in no uncertain terms by the Supreme Court of the United States in *Berger* v. *U. S.*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314.

6.

Conduct of the Court.

After the Jury had retired for consideration of the evidence, it returned several times to ask the Court for further instructions. Without first advising counsel for both parties of his intention to do so, and according them a reasonable opportunity to request special charges the court at once proceeded to give the Jury its version of the law requested. This was error. *Deas* v. *State*, 119 Fla. 839, 161 So. 729.

The court, on one of these Jury returns for instruction, was informed by a juror that there was a wide difference of opinion among the members of the jury concerning

the use of the word "entrapment." After a few words of instruction along that line, the court then went on to charge the jury, in part:

> "The main question in this case, gentlemen, is the question of intent. * * * The whole thing is a question of intent on the part of the defendant. * * * Now, that is all there is to this case" (R. 226-227).

We contend that this instruction on the part of the court tended in effect to influence the Jury's deliberation and that they were not left free to the extent that each juror should follow the dictates of his mind and conscience in arriving at his verdict after consideration of all the facts. He should reason with his fellow jurors but he should not be coerced. *Croft* v. *State*, 117 Fla. 832, 158 So. 454. This is evidently what happened, because the jurors, as will be noted from their repeated requests for information on entrapment, were then in effect deprived of their right to argue and base their verdict on whether or not there had been entrapment. The court in effect took this question, which was one of the defendant's defenses, entirely from consideration of the jurors and left before them merely the point of intent in sending the letter. It is the duty of the court to refrain from intimidation or coercion of the jury. *Boyett* v. *U. S.*, (C. C. A. 5) 48 F. 2d 482.

After the Jury had announced that they were hopelessly divided the Court then proceeded to give the jury an additional charge on the line of the "Allen Case" (R. 223). We contend, however, that this charge was erroneous because it in effect gave the jury to believe that the all-important thing was a final disposition of the case regardless of the rights of the parties.

> "It so slightingly treated the positive duty of each juror to form and to make his verdict express his own honest conviction, based on the evidence in the case, and so forcibly urged deference to the views of the majority and unanimity, that we are unable to

> resist the conviction that it tended too strongly towards coercion of the minority of the jury to surrender their honest convictions in order to acquiese in the convictions of the majority. * * * Its tendency was to bring the minority to an agreement with the others even against the dictates of their own judgment."
>
> *Stewart* v. *U. S.*, (C. C. A. 8) 300 Fed. 769.
>
> See also *Peterson* v. *U. S.*, (C. C. A. 9) 213 Fed. 920.

In the said additional charge in the present case, the court stated:

> "* * * If, however, the large number of jurors are for a conviction, the dissenting jurors should consider whether his doubt is a reasonable one, when it made no impression upon the minds of so many other jurors, equally honest, equally intelligent with himself; if, on the other hand, the majority of the jury is for an acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of judgment which is not concurred in by the majority of their fellows. * * *" (R. 223).

This particular portion of the charge constituted coercion outside the force of reason and advice as to the facts, and reflected upon the juror's intelligence and integrity. *Kesley* v. *U. S.*, (C. C. A. 5) 47 F. 2d 453.

During the prosecuting attorney's argument to the jury, defendant's counsel made an objection and the court said:

> "Objection overruled. Go ahead Mr. Yerkes. Let's not have any more interruptions" (R. 206).

And a short time thereafter when another objection was made by the defense counsel, the court sent the jury out and stated that it appeared to him that petitioner's counsel were trying to heckle the District Attorney and he was going to stop it (R. 208); when counsel as a matter of fact were making objections in good faith based on their recollection of the testimony.

We contend that the court by its statements gagged and closed the mouths of defense counsel and attempted to shut off proper objections to argument. Petitioner contends that the aforesaid procedure denied him his constitutional rights as provided by Sixth Amendment to the Constitution of the United States, which reads:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

Petitioner also states that in addition to the foregoing, the case of *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, fully supports and brings this case within the jurisdictional provisions relied on, especially that part of the Honorable Justice Black's decision on Page 463, thereof, which reads:

> "* * * he requires the guiding hand of counsel at every step in the proceedings against him."

Being informed by the Court that he was going to stop all these objections, defense counsel did not offer any further objections because they felt that they might prejudice the rights of petitioner by some act on the part of the court directed against them. This Court may consider all assignments attacking the propriety of argument of prosecuting attorney thereafter made on the ground that specific objections would have been made but for the court's arbitrary action. *Henderson* v. *State*, 94 Fla. 318, 113 So. 689.

We have not attempted to set forth in full in this Brief all the misstatements made by the government attorney after the court in effect gagged the defense counsel. However, it can be seen from the excerpts above and from perusal of his argument that without any fear of being corrected, or objection being made to his statements the Assistant District Attorney threw caution to the winds and proceeded to villify and attack not only defendant's character, but also made statements not based on any

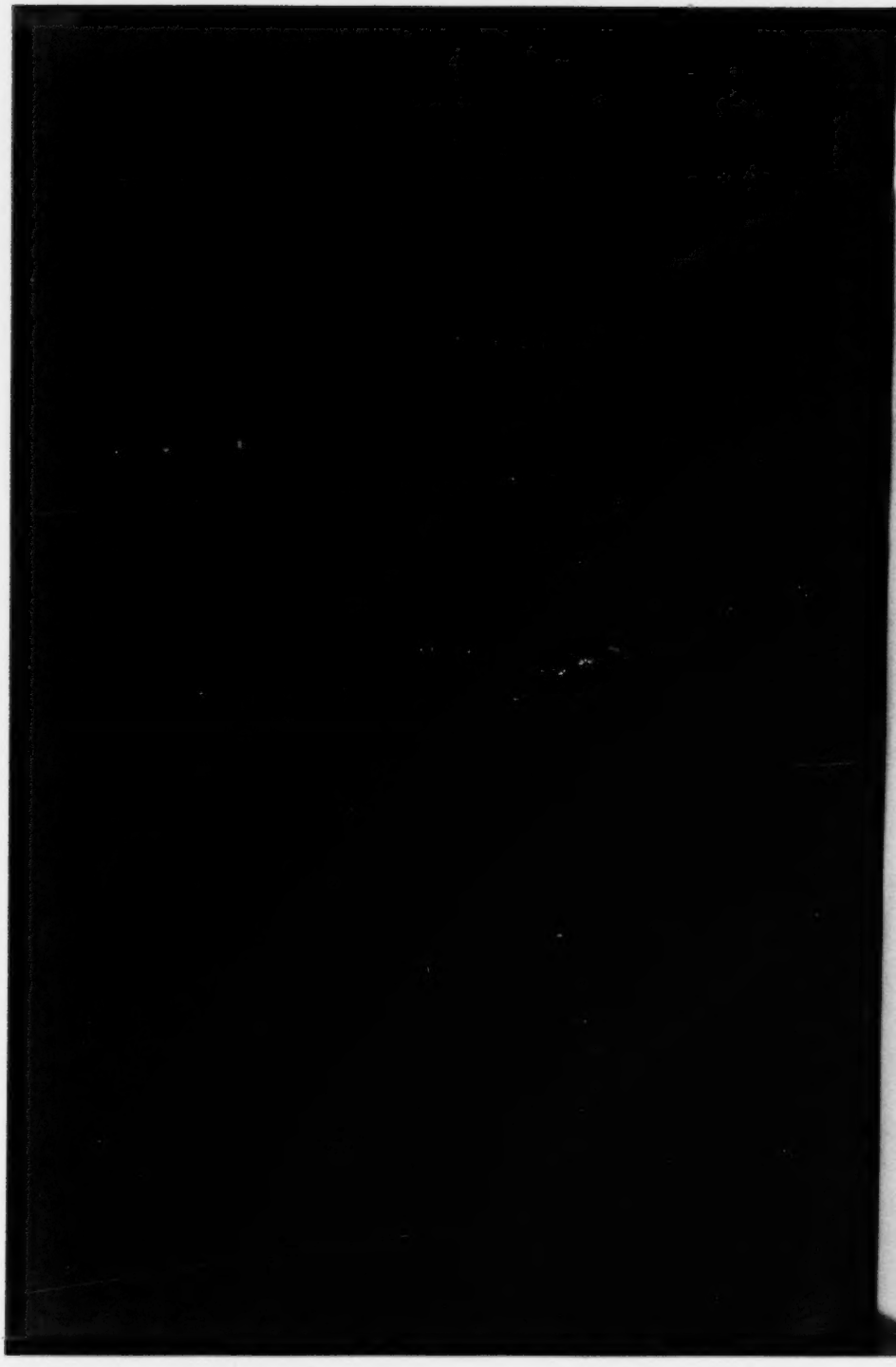
evidence received in the record and on the whole committed numerous prejudicial, reversible errors.

Conclusion.

It is therefore respectfully submitted that this Petition for a writ of certiorari should be granted.

PHILIP DONALD DEHOFF,
Jacksonville, Florida,
Attorney for Petitioner.

March, 1942.



INDEX

CITATIONS

457185—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1082

ALVAH H. WEATHERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 236–239) is reported in 126 F. (2d) 118.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 28, 1942 (R. 239–240). The petition for a writ of certiorari was filed March 27, 1942. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether an indictment for unlawful use of the mails under section 211 of the Criminal Code is fatally defective because a letter upon which it is based does not state positively where or by whom an abortion *will be* produced.

2. Whether the letter which was the basis of the second count of the indictment, on which petitioner had been acquitted at his first trial, was admitted in evidence at the second trial on the first count, and, if so, whether the admission of the letter was error.

3. Whether petitioner was precluded by the trial court from making proper inquiry into the nature of a complaint made against him prior to the sending of a decoy letter and was thereby deprived of an opportunity to show that he was entrapped.

4. Whether the trial court erred in admitting testimony that petitioner had stated that he performed abortions.

5. Whether petitioner was deprived of a fair trial by reason of alleged misconduct of the prosecuting attorney.

6. Whether the trial judge, in the exercise of his discretion, properly directed the jury to deliberate further after they had reported a disagreement, and whether the judge's statement in one of his supplemental instructions that the main question in the case was petitioner's intent had the effect of taking the defense of entrapment from the jury.

STATUTE INVOLVED

Section 211 of the Criminal Code, 18 U. S. C. 334, provides in part:

> Every * * * written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, * * * where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *

STATEMENT

Petitioner, a licensed physician (R. 179, 189), was convicted after a second trial under a single count charging violation of section 211 of the Criminal Code in depositing in the mails nonmailable matter which was intended to give infor-

mation where and by whom an abortion would be produced (R. 1–4). The charge was based upon a letter dated December 4, 1939, mailed by petitioner in Jacksonville, Florida, and addressed to "Mary De Veaux" at Savannah, Georgia (R. 3–4).[1] Petitioner was sentenced to imprisonment for one year and a day (R. 11) and his conviction was affirmed by the Circuit Court of Appeals (R. 239–240).

The case for the Government may be summarized as follows:

Petitioner maintained at his house in Jacksonville, Florida, a so-called maternity home where he treated patients and maintained a few beds for their use (R. 100–101, 117–119; 178–179, 181). A housekeeper formerly employed by petitioner testified that he told her that he performed abortions at this establishment for which he charged $50 (R. 102, 107, 109). Petitioner advertised his "maternity home" in newspapers in Savannah, Georgia, and several other southern cities (R. 34,

[1] The indictment originally contained two counts (R. 236), but at the first trial the court directed a verdict of acquittal on the second (Pet. 4), which was based upon another letter. (See R. 237.) Petitioner was convicted on the first count, but on appeal the conviction was reversed by the court below because of improprieties in the argument of the prosecuting attorney (R. 237; see *Weathers* v. *United States*, 117 F. (2d) 585 (C. C. A. 5)). Petitioner has caused the record on his first appeal to be certified and filed with this Court in connection with the instant petition. This volume is identified by the Circuit Court of Appeals docket number 9541.

36–39, 64–66, 84, 86; 177–178, 191) under the names "Vera Smith" and "The Oaks" (R. 36–38; 178, 180–181); many of these newspapers were circulated through the mails (R. 41–42, 65). The advertisements invited correspondence and gave the number of a post-office box in Jacksonville which was rented by a friend of petitioner's (R. 94–97, 178).

Having received a complaint that petitioner was using the mails in advertising an establishment where abortions were performed (R. 81–82, 84, 86), a post-office inspector caused a decoy letter, dated November 29, 1939, to be mailed as a response to one of petitioner's advertisements in the Savannah papers (R. 28–29, 32, 47). This letter purported to be from an unmarried girl who was six weeks pregnant, and requested a solution of her trouble and particulars as to cost and arrangements (R. 32). Petitioner responded, over the signature "The Oaks", by his letter of December 4, 1939, in which he advised the girl to come to his place, that he would take care of her, and that she could "return home in about a week or 10 days" (R. 60). Thereafter, when he received no response to his letter of December 4, petitioner, still using the name "The Oaks", wrote his decoy correspondent several follow-up letters asking why she had not replied and requesting that she advise him when he might expect her (R. 68–70). In one of these letters petitioner assured his correspondent that "there was a way out of this trouble" (R. 69), and

in another he repeated that "everything can be taken care of all o. k." and that she "need have no worry or fear" (R. 68).

Petitioner was arrested on the morning of January 15, 1940 (R. 50, 71, 89–90, 129), and was released on bond later in the day following a preliminary hearing before a United States Commissioner (R. 72, 171–174). A day or two later the post-office inspector received another letter addressed by petitioner to the decoy correspondent which was dated December 17, 1939, but post-marked 6:30 p. m., January 15, 1940 (R. 70–72, 198). This letter was of an exculpatory nature, containing references to "the little one" and advising the correspondent that petitioner could arrange to have the baby adopted (R. 70–71). The letter was the only one of the series written by petitioner which contained any reference to the birth of a baby.

ARGUMENT

1. Petitioner contends (Pet. 10) that the trial court erred in denying his motion to quash the indictment on the ground that his letter of December 4, 1939, set forth *in haec verba* in the indictment (R. 3), did not state positively where or by whom an abortion *would be* produced. The contention is plainly without merit and was rejected by the court below on the previous appeal. *Weathers* v. *United States,* 117 F. (2d) 585 (C. C. A. 5). The statute (*supra,* page 3) interdicts the giving through the mails of information where or by whom an abor-

tion will be produced. The indictment set forth the decoy letter of November 29 which stated a predicament of which an abortion was the solution indicated by the writer, and alleged that petitioner's letter of December 4 was in response to that letter (R. 2–3). It also alleged that in his letter petitioner intended to give and did give information as to "where, how and from whom, and by what means conception might be prevented and an abortion produced" (R. 3, 4). It is apparent that this allegation uses language from the clause of the statute relating to giving information how or by what means conception *may be* prevented or an abortion produced, as well as from the clause relating to information where or by whom an abortion *will be* produced. Though inartistic, the allegation, when read in connection with petitioner's letter advising his correspondent to come immediately, that he would take care of her, and that she could return home in a week or ten days, fairly charges an intent to give and the giving of information as to where and by whom an abortion *would be* produced; the indictment was therefore sufficient.[2]

[2] *Bours* v. *United States*, 229 Fed. 960 (C. C. A. 7), relied upon by petitioner, does not support his contention. The indictment there, unlike that here, did not contain any allegation connecting the defendant's letter with the decoy letter, and the former, standing alone, could not be said to convey information that an abortion *would be* performed (see *id.* at 965).

457185—42——2

2. Petitioner asserts (Pet. 5, 7, 10–11) that the letter which was the basis of the second count of the indictment, as to which the court directed a verdict of not guilty at the first trial, was admitted in evidence; he argues that this was error in that his prior acquittal was an adjudication determining the nonexistence of the facts upon which the second count was based and precluded the use of the letter in the second trial for the offense charged in the first count.[3]

The record negates petitioner's assertion. The letters which were introduced at the trial below were read into the record, but petitioner's letter of December 19, 1939, upon which the second count was based,[4] does not appear among them (see R. 32, 53–54, 60, 66–71). Nor does the record otherwise indicate that the letter of December 19 was offered or admitted.[5]

---

[3] Petitioner also implies (Pet. 2, 5) that the trial court admitted other unspecified letters which were not proved to have been written by him. However, on his direct examination, petitioner specifically admitted that he received the decoy letter of November 29 and that he wrote the letter of December 4, which was the basis of the first count (R. 175–176). Thereafter, his counsel handed him other unspecified letters which had been introduced by the Government and asked him whether he admitted "writing some of these." Petitioner replied: "Yes, sir; I wrote those letters." (R. 179.)

[4] This letter appears in the record on the first appeal at page 7.

[5] The record shows an objection by petitioner's counsel to the admission of petitioner's letter of December 4 on the

In any event, even if the letter of December 19 had been admitted, there would have been no error. As the court below pointed out (R. 237), that letter was but one in a series of connected correspondence, and was relevant in the trial on the first count as bearing upon the question of petitioner's intent in mailing the letter charged in that count. The same evidence, if relevant to each charge, is admissible to establish the commission of separate offenses. *Ross* v. *United States,* 103 F. (2d) 600, 605, 607 (C. C. A. 9); cf. *Albrecht* v. *United States,* 273 U. S. 1, 11.[6]

3. Petitioner complains that the trial court refused to permit him through counsel to question the post-office inspector on cross-examination regarding the nature of a complaint which had been made against petitioner. He argues that decoying is justified only if the law enforcement officer has personal knowledge that the suspect has committed the offense under investigation or offenses of the same character, and that the effect of the trial

---

ground of *res adjudicata* (R. 58). That letter, however, was the basis of the first count. Counsel later discovered his error and stated that his objection was based upon his mistaken impression that the letter of December 19 was being offered (R. 59).

[6] Petitioner's objection apparently is also directed to other unspecified letters which he says were introduced at the first trial to support the second count. (See Pet. 2, 5, 7.) However, these letters were each a part of the series and were admissible for the same reason as was the letter of December 19.

court's ruling was to deny him an opportunity to show that he was entrapped (Pet. 11–12).

The record shows, however, both that the decoy letter was based upon reasonable grounds to believe that petitioner was using the mails to give information where and by whom abortions would be produced, and that petitioner was not precluded from making proper inquiry into the nature and extent of the information which the inspector previously had in his possession. The inspector testified that he investigated petitioner's practices prior to preparing and mailing the decoy letter (R. 45–46). On cross-examination he stated that he had information that petitioner had used the mails to solicit abortions (R. 81) and that petitioner had been advertising his "maternity home" in newspapers for several years (R. 84, 86). During the course of this cross-examination the inspector stated, with the permission of the court, that he had received a complaint that the mails were being used in advertising an "abortion hospital" operated by petitioner and that upon instructions from his superiors he conducted an investigation which included the preparation and mailing of the decoy letter (R. 86; 81–82).[7] Immediately thereafter peti-

[7] Petitioner argues separately that this testimony was hearsay and prejudicial (Pet. 11). There was no objection to it or motion to strike (see R. 86–87) and its admission was not assigned as error (see R. 16–21) or considered by the court below. The point is therefore not open to petitioner here. *Sonzinsky* v. *United States*, 300 U. S. 506, 514. The

tioner's counsel asked the inspector about "the nature of the complaint" and whether it was a complaint that petitioner "was illegally sending advertising through the mails." Objections to both questions were sustained. (R. 87.) The questions were obviously repetitious of the testimony already given by the inspector and were therefore properly excluded.

Moreover, petitioner's argument misconceives the applicable rules relating to the defense of entrapment. Personal knowledge of offenses against the particular statute for violation of which investigation is being conducted is not prerequisite to use of the decoy method of detecting crime. There is sufficient justification if the officer has reasonable cause to believe that the suspect is engaged in similar criminal conduct and is a person disposed to commit the offense. *Sorrells* v. *United States*, 287 U. S. 435, 451–452; *United States* v. *Becker*, 62 F. (2d) 1007, 1008-1009 (C. C. A. 2). Here the evidence amply established justification and the issue of entrapment was properly submitted to the jury under correct instructions (R. 217–219, 220, 221–222, 226–227, 228–230).

---

contention is, in any event, without merit. The testimony was elicited on cross-examination and was, moreover, material on the defense of entrapment. By that defense petitioner opened an inquiry into his conduct and predisposition to violate the statute and brought any disadvantage of the defense upon himself. *Sorrells* v. *United States*, 287 U. S. 435, 451–452.

Sorrells v. *United States, supra; Hunter* v. *United States,* 62 F. (2d) 217, 219–220 (C. C. A. 5); *United States* v. *Becker, supra.*

4. Petitioner argues that it was error to admit the testimony of his former housekeeper that he had told her that he performed abortions (R. 102), and that as a consequence the trial resulted in his conviction for an offense under state law rather than the offense charged (Pet. 12–13). This evidence, however, was relevant to the question of petitioner's intent to give information where or by whom an abortion would be produced, and it was not rendered inadmissible merely because it indicated the commission of offenses against a state. *Moore* v. *United States,* 150 U. S. 57, 61; *Devoe* v. *United States,* 103 F. (2d) 584, 588 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Suhay* v. *United States,* 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580.

5. Petitioner contends (Pet. 13–15) that the prosecutor was guilty of prejudicial misconduct. The grounds of his complaint will be considered *seriatim.*

a. On his direct examination petitioner's counsel asked him if he had ever been convicted of a crime and petitioner replied in the affirmative (R. 179). Petitioner complains (Pet. 13) that on cross-examination the prosecutor was permitted, over his objection, to question him as to the number of times he had been convicted of felonies in courts of the United States (R. 186–187). The court

promptly instructed the jury that testimony of former convictions was not evidence as to petitioner's guilt or innocence of the charge on trial but was admitted only for its bearing on petitioner's credibility as a witness (R. 185–186). This was entirely proper. When petitioner took the stand his credibility, like that of any other witness, was subject to impeachment. *Raffel* v. *United States,* 271 U. S. 494, 497. And evidence of prior conviction was, of course, admissible on the question of petitioner's credibility. *Rinella* v. *United States,* 60 F. (2d) 216, 218 (C. C. A. 7); *Jebbia* v. *United States,* 37 F. (2d) 343, 344 (C. C. A. 4), certiorari denied, 281 U. S. 747; *Nutter* v. *United States,* 289 Fed. 484, 485 (C. C. A. 4); *MacKnight* v. *United States,* 263 Fed. 832, 840 (C. C. A. 1).

b. Petitioner also complains (Pet. 13–14) that the prosecutor was permitted to interrogate him as to whether he had been barred from practicing medicine. This sequence brought out that petitioner had been barred by the State Medical Board but that the Florida Supreme Court had ordered his license reinstated. Further charges against petitioner were pending before the Board at the time of the trial. (R. 188–190.) The trial court permitted this inquiry as bearing on petitioner's credibility (R. 189). This ruling also was proper. *People* v. *Dorthy,* 156 N. Y. 237, 241.[8]

[8] Petitioner asserts (Pet. 13) that the prosecutor was permitted to question him as to whether his former wife had

CONCLUSION

The decision below is clearly correct and the petition for a writ of certiorari presents no question calling for review by this Court. It is therefore respectfully submitted that the petition should be denied.

CHARLES FAHY,
Solicitor General.
WENDELL BERGE,
Assistant Atorney General.
ROBERT S. ERDAHL,
JOHN FORD BAECHER,
Attorneys.

APRIL 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942